Office Supreme Court
FILED
DEC 28 19
WM. R. STANS

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1926

No. 465

WALLACE R. FARRINGTON, Governor of the Territory of Hawaii, WILLIAM B. LYMER, Attorney General of the Territory of Hawaii, and WILLARD E. GIVENS, Superintendent of Public Instruction of the Territory of Hawaii,
Petitioners,

vs.

T. TOKUSHIGE, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONERS' BRIEF

WILLIAM B. LYMER,
Attorney General of the Territory of Hawaii.

MARGUERITE K. ASHFORD,
First Deputy Attorney General of the Territory of Hawaii.
Attorneys for Petitioners.

CONTENTS

	Page
OPINIONS IN THE COURTS BELOW	1–2
JURISDICTION OF THIS COURT	2
STATEMENT OF FACTS	3
ASSIGNMENT OF ERRORS	17
ARGUMENT	18
I. This court will take judicial notice of the situation leading to the Foreign Language School legislation	18
II. The Foreign Language School Laws of Hawaii do not violate the constitution nor do they fall within the actual decisions of this court in the recent Nebraska, Iowa and Oregan cases	19
III. The legislation was not prompted by mob-psychology	39
IV. Even if one or more of the provisions of the Foreign Language School Acts be unconstitutional, the remainder of the Act, if found constitutional, should be declared valid	40
V. Specific provisions of the Acts	42
CONCLUSION	57
APPENDIX	i
Act 30 of 1920	iii
Act 171 of 1923	vi
Act 152 of 1925	xii
Act 36 of 1920	xvi
General laws relating to private schools	xvii
General law, payment under protest	xx

INDEX OF CASES AND STATUTES

	Page
Farrington v. Tokushige, 11 F. (2nd) 710	1, 49
Section 240, Judicial Code	2
Act 30, Session Laws of Hawaii, 1920	4, 40, 45
Act 171, Session Laws of Hawaii, 1923	6, 40, 53
Act 152, Session Laws of Hawaii, 1925	6
Sligh v. Kirkwood, 237 U. S. 52	18, 26
McLean v. Denver & Rio Grande Railroad Co., 203 U. S. 38	18
Galveston Electric Co. v. Galveston, 258 U. S. 388, 66 L. Ed. 678	18
In Re Craig, 20 Haw. 483	18, 31, 43
Tempel v. United States, 248 U. S. 121, 63 L. Ed. 162	18
Thornton v. United States, Adv. Ops. No. 255	18
Caha v. United States, 162 U. S. 211, 38 L. Ed. 415	19
Pierce v. Society of Sisters of Holy Names, 268 U. S. 510	19, 22, 56
Meyer v. Nebraska, 262 U. S. 390	19, 20
Bartels v. Iowa, 262 U. S. 404	19, 20
Adams v. Tanner, 244 U. S. 594	21, 31
New York v. Miln, 11 Pet. 102, 139	27
Barbier v. Connolly, 113 U. S. 27	27, 37, 38
Camfield v. United States, 167 U. S. 518, 524	27
Chicago, etc., Railway v. Drainage Commissioners, 200 U. S. 561	27
Eubank v. Richmond, 226 U. S. 137	28
Brannon on "The Fourteenth Amendment"	29
Muller v. Oregon, 208 U. S. 412	29

INDEX OF CASES AND STATUTES

(Continued)

	Page
Sturges & Burn v. Beauchamp, 231 U. S. 329	29
Riley v. Massachusetts, 232 U. S. 671	29
State v. Shorey, 48 Oregon, 396 (86 Pac. 881)	29
People v. Ewer, 141 N. Y. 129 (36 N. E. 4)	29
Commonwealth v. Wormser, 260 Pa. St. 44 (103 Atl. 400)	29
McCluskey v. Tobin, 252 U. S. 107	30
25 Cyc. 613	30
American Bar Association Journal, Feb. 1925, p. 112	31
Gundling v. Chicago, 177 U. S. 183	31, 50
Dent v. West Virginia, 129 U. S. 114	32
Ex Parte McManus, 151 Cal. 331	32, 50
Mutual Film Corp. v. Ohio Indus'l Comm. 236 U. S. 230	32, 50
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61	33
Rast v. Dan Deman & Lewis Co., 240 U. S. 342	34
Crescent Oil Co. v. Mississippi, 257 U. S. 129	34
Armour & Co. v. North Dakota, 240 U. S. 510	34
Ward & Gow v. Krinsky, 259 U. S. 503	34
Territory v. Takanabe, 28 Haw. 43	35
Patsone v. Pennsylvania, 232 U. S. 138	35
24 Ruling Case Law 621	36
State v. Bailey, 157 Ind. 324	36
Sections 313-315, Revised Laws of Hawaii, 1925	37, 50
Interstate Railway Co. v. Massachusetts, 207 U. S. 79	38

INDEX OF CASES AND STATUTES

(Continued)

	Page
Commonwealth v. Boston & Northern St. Ry., 212 Mass. 83	38
Berea College v. Kentucky, 211 U. S. 45	40
Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601	40
Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362	40
Sections 391, 392, 394, Revised Laws of Hawaii, 1925	42, 43, 50
Territory v. Field, 23 Haw. 230	43
Milton Dairy Co. v. Great Northern Ry. Co., 124 Minn. 239 (144 N. W. 764)	43
Northern Pacific Railroad v. Whalen, 149 U. S. 157	43
Mutual Film Corp. v. Kansas, 236 U. S. 248	43
McCabe v. A. F. & S. F. Ry. Co., 235 U. S. 151	43
Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207	43
In re Kalama, 22 Haw. 96	43, 44
Tai Kee v. Minister of Interior, 11 Haw. 57	43
Territory v. Kua, 22 Haw. 307	44
Royall v. Virginia, 116 U. S. 572	44
Wilson v. Lord-Young Engineering Co., 21 Haw. 87	44
Territory v. Apa, 28 Haw. 222	44
Cavanaugh v. Looney, 248 U. S. 453	45
New London v. Howe, 94 Conn., 269, 108 Atl. 529	45, 51
The King v. Lau Kui, 7 Haw. 489	45
Hall v. Geiger-Jones Co., 242 U. S. 539	50
Merrick v. Halsey & Co., Id., 568	50
Bratton v. Chandler, 260 U. S. 110	50

INDEX OF CASES AND AND STATUTES

(Continued)

	Page
Riley v. Chandler, 181 Cal. 589 (185 Pac. 855)	50
Act of 1865	37, 50
Flint v. Stone Tracy Co., 220 U. S. 107	51
United States v. Baltimore Post, 16 U. S. S. C. Adv. Ops. 1924-5, 633	51
2 Fed. St. An., 2nd ed., pp. 50-1	52
United States v. Sarle, 45 Fed. 191	52
Salisbury v. Equitable Purchasing Co., 147 S. W. 813	52
Section 396, Revised Laws of Hawaii, 1925	52

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1926

No.———

WALLACE R. FARRINGTON, Governor of the Territory of Hawaii, WILLIAM B. LYMER, Attorney General of the Territory of Hawaii, and WILLARD E. GIVENS, Superintendent of Public Instruction of the Territory of Hawaii,
Petitioners,

vs.

T. TOKUSHIGE, et al.,
Respondents.

BRIEF ON WRIT OF CERTIORARI

OPINIONS IN THE COURTS BELOW

The cause is before this court upon a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, made and entered in the case of Farrington vs. Tokushige. 11 F. (2d) 710, which said judgment affirms the order of the United States District Court for the Territory of Hawaii, made and entered in the case of Tokushige vs. Farrington, issuing a preliminary injunction (no written opinion, order appears, R. 129), en-

instances afterwards, and in still other instances both before and after, without vacation on Saturday and with very little vacation during the entire year, the resulting fatigue of the children, as well as the nationalistic type of instruction, seriously hampered the effective instruction of the child in the public schools (Survey, pp. 114, 127-130).

The Commission reached the conclusion (Survey, p. 134) that the Language Schools "are centers of influence which, if not distinctly anti-American, are certainly un-American."

Following this report, Act 30 of the Session Laws of 1920, the first of the Foreign Language School laws, was enacted.

This law (p. i, Appendix) provided that no one should conduct or teach in a Foreign Language School without a permit from the Department of Public Instruction. No fees were imposed but the applicant was required to give a pledge to observe the law and the regulations of the Department thereunder and to the best of his ability to direct the minds and studies of the pupils in such a way as would tend to make them good and loyal American citizens and not to instruct them in a way inconsistent therewith. Teachers were required to qualify in knowledge of ideals of democracy, American history and institutions and the English language, but the requirement as to English was to be liberally construed for a period of two years so as to afford sufficient time to qualify. Subject to modification by the Department, in case it should find that it could do so consistently with the object of the Act, the Foreign Language

Schools were not to hold sessions before or during the sessions of the public schools and, although the afternoon sessions might be longer than one hour, no pupil was to attend more than one hour a day nor more than six hours a week nor more than thirty-eight weeks a year. The Department was authorized to prescribe the courses of study and the text books but not to furnish books at its expense. The penalty for a violation of the Act was a fine not to exceed $25. In order to allow ample time for preparation, the Act was not to take effect until July 1, 1921, although enacted November 24, 1920.

Under this law certain regulations were passed by the Department of Public Instruction (R. 104). These regulations prescribed that up to September 1, 1923, pupils should have first satisfactorily completed the public school first grade or its equivalent and thereafter the first and second grades or their equivalent before attending a Foreign Language School; also that beginning September 1, 1923, and thereafter, for grades one, two and three, and beginning September 1, 1924, and thereafter, for grades four and above, all new text books used in elementary Foreign Language Schools should be based upon the principle that the pupil's normal medium of expression is English and should contain as far as practicable English equivalents for foreign words and idioms.

The statute having been contested in the Hawaiian court by some of the Japanese Language Schools and the Judge who tried the case having held that although the Act itself was valid, the regulations were

not, the Legislature thereupon in 1923 by Act 171 amended Act 30 of 1920 (Appendix, p. iv), in large part by incorporating in the act the substance of the regulations of the Department of Public Instruction at the same time enlarging the powers of the Department in the making of regulations (R. 104-105).

Also, in view of additional light which had been thrown on the whole situation, the Legislature deemed it advisable to provide and did provide for the appointment of one or more inspectors of the Foreign Language Schools; and, in order to provide the necessary funds for this and for other expenses in connection with the Foreign Language Schools, the payment of a license fee at the rate of $1 per pupil per school year (Sept. 1-Aug. 31) was required as a prerequisite to obtaining a permit, and all of the proceeds of the fees were appropriated for the expenses of carrying out the Act, but it was provided also that if the fees should yield more than was necessary for that purpose the Department might reduce them. In addition the schools were required to make annual reports to the Department, and it was provided also that if any part of the Act should be held unconstitutional or invalid that should not affect the validity of the Act as a whole or of any other part.

Finally the Legislature of 1925, because of the difficulties in collecting fees owing to the elusive nature of the Language Schools as being not only unincorporated associations but without constitutions or by-laws and of uncertain or unascertainable membership, enacted Act 152 (Appendix, p. x), amending

the provisions of the law relating to fees by providing that the fees should be payable by the schools whether they took out permits or not (the law previously having made the payment of a fee merely a prerequisite to obtaining a permit and the remedy merely a penal prosecution for conducting a school without a permit), by providing civil and penal remedies for their collection, and by prohibiting the issuance of injunctions against either civil or penal remedies as to the fees but providing also that the fees might be paid under protest and that action might be brought to recover them back if their validity should be questioned. This Act was not to become operative until the 10th of May.

Following the enactment of this last law the plaintiff schools closed for several weeks and then brought this suit in the United States District Court at Honolulu, June 13, 1925 (R. 94). Upon obtaining the temporary restraining order issued upon the filing of their suit, they then reopened and are now running.

Upon the hearing of the cause before the District Judge, after extended argument upon the motion to dissolve the restraining order and as a result of certain further proceedings in the cause, a temporary injunction was issued restraining the defendants from enforcing the various Acts in any of the modes enumerated in the court's order (R. 178). From that order the defendants appealed to the Circuit Court of Appeals for the Ninth Circuit (R. 149), where the judgment of the court was entered affirming the order of the District Court upon the ground

that the Foreign Language School laws of the Territory were unconstitutional and without the scope of the police power of the Territory. A petition to this court for a writ of certiorari was granted October 18, 1926, and the case is now set for hearing upon such writ.

A brief statement of additional facts on the situation in Hawaii, which has occasioned the Foreign Language School education and regulations, and of which we assume this court will take judicial notice, may prove helpful.

One of the most striking features of the population of Hawaii has long been its extremely mixed character in respect of varieties of races and crosses between races but quite as striking has been the extraordinary degree to which such races have dwelt and dealt with each other in amity and cooperation and to which there has been an absence of racial antagonisms. While American ideals have long been conspicuously dominant and the assimilability of such ideals by other races in general has been marked, there have nevertheless arisen as to the future citizenship of the Territory serious questions which have long been the subject of earnest thought and discussion. These questions have gradually centered mainly upon the Japanese element in the population owing to its great increase in numbers absolutely and relatively, its rapid and extensive change from foreign-born to native-born, the latter by reason of such birth being American citizens, and the disposition on the part of certain of the foreign-born to aloofness and racial assertiveness not only on their

own part but in their aggressive efforts to lead or force the native-born in the same direction. This has called for the laws and regulations in question, which are the result of the best thought of the higher types of the older foreign-born Japanese residents and of those American residents who are most sympathetic towards the Japanese and who are taking the chief interest in working out an amicable solution of the problems presented and which have the support of the greater number of the native-born Japanese who have become old enough to think upon these questions.

There are now in Hawaii 164 Foreign Language Schools of which 10 are Korean, 10 are Chinese and 144 are Japanese (R. 111). They have about 400 teachers and, as the plaintiffs allege (R. 15), the Japanese Language Schools alone have about 20,000 pupils. As they also allege (R. 13-14), the members of the unincorporated associations conducting the schools and their teachers and the parents of the pupils are in general Japanese subjects, while as shown by the affidavit just referred to (R. 112), the pupils themselves are practically all American citizens by reason of birth within the United States—the percentage of those who are American citizens being constantly on the increase and the more so in the lower grades. When the Japanese Schools began not only were their pupils very few, but the majority of them were Japanese citizens. Now, not only are they very numerous, but nearly 99 per cent of them are American citizens. In 4 of the Chinese, 7 of the Korean and 65 of the Japanese Language Schools

there is not a single alien pupil. All of the 10 Korean, the 10 Chinese and 58 of the Japanese Language Schools have paid their fees as required by the statute and all of the Foreign Language Schools, including even the plaintiff schools, are complying with some and in many instances with all of the other provisions of the statutes (R. 111).

The Japanese began to be introduced into Hawaii as laborers in appreciable numbers in 1885 and from then until the establishment of Territorial Government in 1900 about 70,000 were so introduced—under appropriate restrictions of the Kingdom and Republic of Hawaii. Most of these were unmarried or, if married, did not bring their wives, and few children were born. Many returned sooner or later to Japan. Then immigration control passed to the United States and from 1901 to 1907 under the more liberal Federal laws about 40,000 Japanese immigrants arrived in the Territory, many of whom as well as many of those who had previously arrived went to California in such numbers as to arouse sentiment there to such an extent as to bring about the "Gentleman's Agreement" of 1907, since when the departures of Japanese from Hawaii have approximated arrivals, but the arrivals have been largely "picture brides" (now stopped by the Immigration Act of 1924) and wives of Japanese already in Hawaii, and this fact coupled with the fact that the Japanese in Hawaii became more settled in their residence by reason of the adoption of the "Gentleman's Agreement" resulted in a tremendous increase in the native-born Japanese population, the foreign-born remaining al-

most constant. The Japanese population in Hawaii increased from 116 in 1885 to 109,274 in 1920 (128,068 out of a total population of 306,551, exclusive of army and navy personnel numbering 17,094 in 1925); the native-born Japanese, from 4,855 in 1900 to 48,586 in 1920 (70,860 in 1925); and the foreign-born, from 56,256 in 1900 to 60,688 in 1920 (57,208 in 1925). The Japanese pupils in the public and equivalent private schools (exclusive of the Foreign Language Schools) increased from 1,352 in 1900 to 19,354 in 1920 (30,487 out of a total of 65,369 pupils of all races on Dec. 31, 1924). Practically all of the children who attend the Foreign Language Schools attend also the public or equivalent private schools (R. 112). The plaintiffs also allege this (R. 49). The foregoing population figures, except for 1925, are taken from the census reports; those for 1925 are from the official estimate of the Board of Health based on the 1920 census and the official statistics of births and deaths and arrivals and departures since. The pupil figures are from the official reports of the Department of Public Instruction.

The "Survey" above referred to sets forth the history of these schools to some extent and shows that as early as 1915 as a result of the prominence into which the problem of the Japanese Language Schools from the American standpoint had already come, the Japanese Educational Association composed of teachers of the Japanese Language Schools, caused the text books (which were the official text books published and used in Japan) to be revised, by a Japanese professor brought from Japan for the purpose,

so as to introduce into them more or less pertaining to the United States and to Hawaii by omitting some of the chapters and substituting others, so that thereafter the subjects covered were partly Japanese and partly American—including more or less of American history, institutions and ideals. The "Survey" shows also, in Chapter III above mentioned and on pages 379-403 of its Appendix, the subjects covered in these text books at the time of the passage of the first of the Foreign Language School laws in 1920 (and still used in the litigating schools) and the tendency of the foreign-born teachers in these schools to teach the pupils to look to Japan as their country, to the Emperor of Japan as their sovereign and to the Japanese language as their language, and especially as under Japanese law the children, though born in America, were deemed to be Japanese citizens, while by American law they were American citizens. To some extent the teachers straddled by teaching loyalty to both countries—on the theory of dual citizenship. One of the leaders among the principals of the Japanese Language Schools is quoted at page 114 as saying in an address to the Japanese Educational Association: "Any man who is to teach Japanese language schools should not be a man with democratic ideas. The language school is not a place for a man with strong democratic ideas. A man of strong Japanese ideas should be its teacher." Instruction in the Japanese language in these schools hampered effective instruction in the English language in the public and equivalent private schools, especially among the younger pupils. These schools,

moreover, held their sessions before and after the sessions of the public schools,—a session in some schools lasting as long as 2½ hours, the pupils attending in some instances the morning session, in other instances the afternoon session and in other instances both sessions; and the schools were in session Saturdays as well as other days and nearly the entire year with very little vacation ("Survey", p. 114). Naturally the children became so fatigued as to handicap seriously the work in the public schools and equivalent private schools. The effect upon the health of the pupils, upon the efficiency of the work in the public schools and equivalent private schools and upon the loyalty of the pupils to America is set forth, with much expert testimony, on pages 125-133 of the "Survey". The "Survey" and much else was before the Legislature when it passed Act 30 in 1920.

A bill had been introduced in the 1919 Session of the Legislature to abolish the Foreign Language Schools but the Legislature refused to pass it. Between that session and the Special Session of 1920 much attention was given to this subject by the Chamber of Commerce of Honolulu and other bodies as well as individuals, and various bills of a regulatory as distinguished from a prohibitory nature were drafted. Then finally the more progressive leaders among the Japanese, including the President and Secretary of the Japanese Chamber of Commerce, the Bishop of the principal Buddhist sect, the principals of Japanese Language high and grade schools, Christian, Buddhist and independent teachers, professional men, including doctors and min-

isters, bankers and business men, drafted a bill and proposed its enactment—with the result that other proposed legislation, some of it of a more radical nature, was abandoned and the bill proposed by the Japanese was enacted November 24, 1920, as Act 30 —the first of the laws now in question.

Following this enactment in January, 1921, courses of lectures were given by specially qualified persons to the Japanese Language School teachers on ideals of democracy and American history and institutions and these were published in both Japanese and English in little books which were distributed throughout the Territory, and the examinations of applicants for permits to teach have ever since been based upon these books. The result of the first examinations, held in July, 1921, was that far more applicants received permits to teach than there were positions to be filled. At the time of the hearing of the motion for a preliminary injunction in this case there were outstanding 609 permits to teach, of which upwards of 500 were for teachers in the Japanese Language Schools (R. 112) as compared with a total of about 300 teachers alleged by the plaintiff schools to be employed in the Japanese Language Schools (R. 15). The number having permits would be much larger but for the fact that in 1923 and 1924 many who would otherwise have taken the examinations were induced to refrain from doing so. Since the hearing on the motion for a preliminary injunction in this case about 100 additional applicants have taken their examinations. All or practically all of the Foreign Language Schools and their teachers observed all of

the provisions of Act 30 until the end of 1922 and since then many have continued to observe all the provisions and the others have continued to observe some of the provisions, such as that in regard to sessions and attendance. (R. 48, 111.)

In 1922 a joint committee of specially qualified persons from the University, from the public schools, from equivalent private schools and from the Japanese Language Schools, the members of the latter group being selected, at the request of the Department, by the Japanese Consul General, was appointed to revise the text books in conformity with superior pedagogical principles and for the purpose of further Americanizing them and correlating them with the study of English in the public and equivalent private schools. This joint committee after investigation and discussion with reference not only to the health of the younger children and the learning of the English language in the public schools, but also the learning of the foreign languages in the Foreign Language Schools, made recommendations to the Department which were embodied in regulations adopted November 18, 1922, and approved by the Governor and published with explanatory statements. These regulations prescribed that up to September 1, 1923, pupils should have first satisfactorily completed the public school first grade or its equivalent and thereafter the first and second grades or their equivalent before attending a Foreign Language School; also that beginning September 1, 1923, and thereafter, for grades one, two and three, and beginning September 1, 1924, and thereafter, for

grades four and above, all new text books used in elementary Foreign Language Schools should be based upon the principle that the pupil's normal medium of expression is English and should contain as far as practicable English equivalents for foreign words and idioms. It was believed also that as much, if not more, could be accomplished in six years with the improved text books as in eight years with the old text books.

The Department caused such improved text books to be prepared for the grades above the second by a number of prominent and highly qualified teachers in the Japanese Language Schools under the supervision of the Territorial Supervisor and, although the plaintiffs claim (R. 96) that such text books contained many errors, that was true only of the first edition. The books were thoroughly revised so as to be reasonably free from errors and have long been in use in a large number of the Japanese Language Schools—to the satisfaction of the teachers, parents and children alike and have proved to be more valuable than the text books formerly used in such schools and still used in most if not all of the litigating schools, and have greatly increased the interest of all in the teaching and studying of the Japanese language in the schools which use them. The fact is that it is difficult to avoid errors in Japanese books, and the books prepared for and used in the litigating schools not only contain errors but are pedagogically of inferior quality as well as less suitable in context matter for pupils who are American citizens. (R. 118.) The Department has since caused improved

text books for the first and second grades to be prepared for the opening of the school year beginning in September, 1925, as planned (R. 67), and on June 1, 1925, by the regulations now complained of (R. 66) practically abolished the requirement that pupils should have completed the first and second grades in the public or equivalent private schools before attending the Foreign Language Schools by providing that that requirement should not apply to those schools which used text books approved by the Department—the Department having carefully studied the results during the two years since that requirement had been enacted and come to the conclusion that it could be relinquished without undue disadvantage in the cases of all schools which used the improved text books.

ASSIGNMENT OF ERRORS

The petitioners herein rely particularly upon the assignment of error made in the Circuit Court of Appeals and here repeated, that the Foreign Language School Acts of the Territory are constitutional.

"1.

"Said Judge erred in so enjoining or causing to be enjoined the plaintiffs, notwithstanding that said Acts and regulations and the several provisions thereof are constitutional and valid, and in not holding that the same are constitutional and valid as to each of said provisions." (R. 155.)

II.

The court erred in declaring the entire statute unconstitutional without regard to

the fact that the various provisions thereof were independent of each other.

ARGUMENT

I

THIS COURT WILL TAKE JUDICIAL NOTICE OF THE SITUATION LEADING TO THE FOREIGN LANGUAGE SCHOOL LEGISLATION.

The references to Bulletin 1920, Number 16, issued by the Commissioner of Education, as well as to facts concerning the large proportion of foreigners, have been fairly referred to, we believe, upon the theory that the court will take judicial notice of the reports, and of the facts underlying the Foreign Language School situation in Hawaii.

This Court took judicial notice:

Of the situation of the citrus fruit interest in Florida; Sligh v. Kirkwood, 237 U. S. 52 at 61;

Of the live stock business of New Mexico; McLean v. Denver & Rio Grande Railroad Co., 203 U. S. 38 at 51;

And of the financial condition of the country following the war; Galveston Electric Co. v. Galveston, 258 U. S. 388, 66 L. Ed. 678.

The Hawaiian Supreme Court has done the same with reference to labor and immigration:

In Re Craig, 20 Haw. 483, 492.

This Court has taken judicial notice of the Report of the Secretary of War; Tempel v. United States, 248 U. S. 121, 63 L. Ed. 162;

Of the regulations of the Department of Agriculture; Thornton v. United States, Adv. Ops. No. 255, decided June 1, 1926;

And of the regulations of the Department of the Interior; Caha vs. United States, 162 U. S. 211, 38 L. Ed. 415.

II

THE FOREIGN LANGUAGE SCHOOL LAWS OF HAWAII DO NOT VIOLATE THE CONSTITUTION NOR DO THEY FALL WITHIN THE ACTUAL DECISIONS OF THIS COURT IN THE RECENT NEBRASKA, IOWA AND OREGON CASES.

The great question before this court is whether or not the legislation here concerned falls within the actual decisions of this court in Pierce v. Society of Sisters of Holy Names, 268 U. S. 510, Meyer v. Nebraska, 262 U. S. 390, and Bartels v. Iowa, 262 U. S. 404. The Circuit Court of Appeals held that the decisions in those cases govern the case at bar. The petitioners herein contend that those cases govern prohibitory legislation alone and not purely regulatory legislation such as has been adopted by the Legislature of Hawaii which attempts rather to supervise and control than to abolish Foreign Language Schools.

The petitioners herein feel that the decisions of the court in Meyer v. Nebraska and Bartels v. Iowa support rather than militate against the constitutionality of the Hawaiian legislation relating to Foreign Language Schools.

The Nebraska statute absolutely prohibited (1) the teaching of any subject in any language other than the English language in any school, public or private, and irrespective of the age or stage of de-

velopment of the pupils or students, and (2) the teaching of any language as such, whether the teaching of it was in that language or in the English language, to any pupils whether in public or private schools until the pupils should have successfully passed the 8th grade, that is, should have been prepared to enter the high school. The Iowa and Ohio statutes were of a similar nature. Those Acts thus absolutely prohibited the teaching of any subject in a foreign language at any time and any foreign language until after the primary and grammar grades, and in effect abolished a large group of schools altogether. The Acts now in question do not prohibit the teaching of foreign languages at all nor do they at all prohibit the teaching of those languages in the languages themselves, nor do they in effect abolish any schools or even handicap them in any way to which exception can be taken. The decision in the second case, Bartels v. Iowa, covering the Iowa and Ohio statutes, merely follows the decision in the first case, Meyer v. Nebraska, and the dissenting opinion of Justices Holmes and Sutherland in both cases is found at page 412 in the second case. The reasoning of the majority of the court is found in the first case. The majority opinion itself recognized the object of the Act to be praiseworthy but held that the legislature undertook to accomplish it in a wrong way—that being a prohibitory as distinguished from a regulatory statute and the occupation being one which was useful in itself and therefore subject only to regulation. The Court said on pages 400, 402:

"The challenged statute forbids the teaching

in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. . . ."

"The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown. . . ."

"Our concern is with the prohibition approved by the Supreme Court. Adams v. Tanner, supra, p. 594, pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State."

In these passages the Court shows the real basis of its decision—that the Act was one of "abolition"; and it distinctly states that "regulation may be entirely proper". Then, apparently in order to insure

that it would not be misunderstood, it went further in other parts of the decision and said much more that would justify the legislation now in question as follows, on pages 400, 401, 402:

> "The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares, 'Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged'. Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.
>
> "Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. . . ."
>
> "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. . . ."
>
> "The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. . . ."

In the Oregon case of Pierce v. Society of Sisters of Holy Names, 268 U. S. 510, the Act, as a prohibitory act, went even further than the acts of Nebraska,

Iowa and Ohio. It prohibited attendance of children between the ages of eight and sixteen years at any school other than a public school during the portion of the year in which the public schools were in session in the respective districts in which the children resided, except in special cases in which the children were not normal or had completed the eighth grade or resided at considerable distances from any public school, etc. The State Court was not called upon to pass upon the validity of the Act, but its invalidity was so patent that doubtless that court would have held it unconstitutional. The lower Federal Court as well as the Federal Supreme Court unanimously held it invalid. But, in this case also as in the Nebraska case, the court evidently did not wish to be misunderstood and hence it said, on page 534:

> "No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."

It would seem as if nothing more could be desired in order to support the Acts in question than these opinions of the Federal Supreme Court. It would indeed, we submit, be a sad commentary on our system of government as well as a shock to our common sense to hold that the Territory must stand by impotently as a mere onlooker and watch its foreign-born

guests conduct a vast system of schools of American pupils—keeping these infants at it from dawn to dusk before and after the public school hours, teaching them loyalty to a foreign country and disloyalty to their own country, and hampering them during their tender years in the learning of the home language in the public schools; to hold that the Territory could not by mere regulatory measures even alleviate these evils to a moderate extent while not interfering in the least with the proper maintenance of these schools or the teaching of foreign languages in them, but on the contrary making them more efficient for this their declared main object. And yet this is the substance of the plaintiffs' contention—in the face of the pronouncements of the highest court in the land that the American people have always regarded education as a matter of supreme importance; that religion, morality and knowledge are necessary to good government and the happiness of mankind and hence justify the encouragement of schools and the means of education; that compulsory educational laws are justifiable; that education of the young is possible only in schools conducted by especially qualified persons; that the State may go very far in order to improve the quality of its citizens physically, mentally and morally; that it may compel attendance at some school and make reasonable regulations for all schools and even require the teaching of English; that it may reasonably regulate all schools and inspect, supervise and examine them, their teachers and pupils; that it may require all children of proper age to attend some school; that teachers shall be of good moral character and patri-

otic disposition; that certain studies plainly essential to good citizenship be taught and that nothing be taught which is manifestly inimical to the public welfare. The justification of the establishment and maintenance of the public school system is the future general welfare of the state as well as the welfare of the persons immediately concerned who are not fully *sui juris;* and that is the justification of the legislation now in question. It is of course immaterial that the criticism of these schools is not equally applicable to all of them or not at all applicable to some of them—especially at the present time. The general situation is what must be considered and that too at the time of the passage of the legislation or as it might be now but for the legislation.

The main fallacies of the argument that the Foreign Language School legislation is beyond the police power of the Territory lie in the assumptions that the police power extends only to the public health, safety and morals, using those words in an extremely limited sense, and that the Foreign Language Schools are to be regarded merely as business enterprises—mainly from the standpoint of the proprietors. The truth is of course that either the words "public health, safety and morals" as thus used must be taken in a very comprehensive sense or else that the police power must be held to extend beyond them so as in any event to cover the general welfare, prosperity and convenience. Of course also the Foreign Language Schools are not to be regarded merely as business enterprises. The state has authority in regard to such schools other than as mere businesses

for at least two reasons: (1) that as *parens patriae* it has extensive power with respect to infants which it does not have with respect to adults, and (2) that it is vitally interested in the quality of its citizenship, whether this be regarded as a matter of public health, safety and morals or a matter of public welfare. Even other businesses require different treatment as among themselves.

On the extent of the police power, Sligh v. Kirkwood, 237 U. S. 52, is perhaps the leading case. An Act of the Florida legislature prohibiting the sale or shipment of citrus fruits which were immature or otherwise unfit for consumption was upheld as a proper exercise of the police power for the purpose of protecting the reputation of the State in foreign markets and thus promoting a leading industry of the State (and notwithstanding that it incidentally affected interstate commerce). Opposing counsel in the case at bar have contended in the Territorial courts that the decision in the Sligh case was to be explained on the theory that the legislation was for the public health. Counsel on one side, it is true, in that case based one of their arguments on that ground, but counsel on the other side pointed out that it had no application because the public health, if any, in question, was not that of the people of the State which enacted the law, but was that of people outside of the State to whom the citrus fruits were to be exported, and the Federal Supreme Court based its decision squarely on the proposition that the police power extends "not only to regulations which promote the public health, morals and safety,

but to those which promote the general convenience or the general prosperity," and justified the law on the ground that "the protection of the State's reputation in foreign markets with the consequent beneficial effect upon a great home industry may have been within the legislative intent, and it certainly could not be said that this legislation had no reasonable relation to the accomplishment of that purpose." On the extent of the police power the Court said, on pages 58 and 59:

> "The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court. At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the state, whether in their public or private relations, whether it related to the rights of persons or property of the public or any individual within the state. New York v. Miln, 11 Pet. 102, 139. The police power, in its broadest sense, includes all legislation and almost every function of civil government. Barbier v. Connolly, 113 U. S. 27. It is not subject to definite limitations, but is co-extensive with the necessities of the case and the safeguards of public interest. Camfield v. United States, 167 U. S. 518, 524. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. Chicago &c. Railway v. Drainage Commissioners, 200 U. S. 561, 592. In one of the latest utterances of this court upon the subject, it was said: 'Wheth-

er it is a valid exercise of the police power is a question in the case, and that power we have defined as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. . . . And further, 'It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.' Eubank v. Richmond, 226 U. S. 137, 142."

And on page 61:

"Furthermore, this regulation cannot be declared invalid if within the range of the police power, unless it can be said that it has no reasonable relation to a legitimate purpose to be accomplished in its enactment; and whether such regulation is necessary in the public interest is primarily within the determination of the legislature, assuming the subject to be a proper matter of state regulation.

"We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the State of Florida. It was competent for the legislature to find that it was essential for the success of that industry that the reputation be preserved in other States wherein such fruits find their most extensive market. The shipment of fruits, so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the State. The protec-

tion of the State's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose."

See, in general, chapter on "The Police Power" in Brannon on "The Fourteenth Amendment."

That, in the exercise of the police power, the legislature may go much further in the case of infants than in the case of adults, and even, as between adults, in the case of women than in the case of men, and that, with respect to both infants and women, it may do so both in the interests of the persons immediately concerned and in the interests of the public with a view to the future welfare of the state, see, on subjects other than education: Muller v. Oregon, 208 U. S. 412; Sturges & Burn v. Beauchamp, 231 U. S. 329; Riley v. Massachusetts, 232 U. S. 671; State v. Shorey, 48 Oregon, 396 (86 Pac. 881); People v. Ewer, 141 N. Y. 129 (36 N. E. 4); Commonwealth v. Wormser, 260 Pa. St. 44 (103 Atl. 400).

As is well known, there are two classes of occupations with reference to legislative control: (1) those which may be regarded as harmful in themselves, such as selling liquor, conducting lotteries, etc., and which may be absolutely prohibited, (2) those which are regarded as useful and harmless in themselves, but which may be regulated not only for purposes of public health, safety and morals strictly speaking, but also for purposes of general welfare. Of course the power to regulate is not without limitations. The legislature cannot prohibit occupations of the

latter class under the guise or subterfuge of regulation or make what might be proper regulations in kind so severe that they would in effect be prohibitory; nor can the regulations be purely arbitrary or unreasonable—as by providing that no one shall teach in a Japanese Language School unless he has blue eyes or that no more than three teachers shall be employed in any one school. The object must be a proper one and the means must have some proper relation to the object. There is, however, no third class of occupations which is sacrosanct or above or beyond the law. The king may be above the law under certain forms of government; but in a democracy or republic like ours no individual and no occupation is above the law. Occupations may vary in the extent to which they may be regulated or controlled, but none is free from the power to regulate insofar as the circumstances warrant, and the legislature is the sole judge as to this so long as it acts within constitutional limitations. An act may go far in prohibitory form and yet be regulatory. McCluskey v. Tobin, 252 U. S. 107.

> "The requirement by the state of a license is not restricted to businesses or occupations which are immoral, vexatious, or injurious to society, but extends to all occupations, except where the power of the state to exact the license is expressly limited by the constitution of the United States or by the constitution of the state itself." 25 Cyc. 613.

Beginning on the next page (25 Cyc. 614) a long list is given of occupations which have been the subject of statutory regulations upheld by the courts.

Not infrequently when a law is passed to meet a new situation that has developed, legal minds—steeped in tradition, precedent and conservatism—are apt at first to question it—even though time may prove it to be merely a new application of old principles. See article in American Bar Association Journal, February, 1925; p. 112. We have become so used to licenses and regulations of other professions and businesses that we take their validity as a matter of course. We have elsewhere enumerated many such covered by Hawaiian statutes.

That regulation, as distinguished from prohibition, many extend to all occupations and professions, is shown by the following statement in Gundling v. Chicago, 177 U. S. 183 at 188:

> "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference." Quoted in In Re Craig, 20 Haw. 483 at 495.

And in Adams v. Tanner, 244 U. S. 590, in which the statute, relating to employment agencies, was

held invalid on the ground that it was of a prohibitory nature (as the court said at p. 593, "The statute is one of prohibition, not regulation"), the court distinguished (p. 596) "between the useful business which may be regulated and the vicious business which can be prohibited" and stated that between these there lie "occupations, which may or may not be harmful to the public, according to the local conditions, or the manner in which they are conducted," and said, with reference to occupations which were not *per se* harmful, at page 594:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way."

And, as to what businesses might be regulated, it continued:

> "Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices. . . ."

Among the numerous cases upon statutes of this general character—the licensing of professions and occupations—the following are selected as particularly satisfactory in their statement of the reasons in support of the validity of such statutes:

Dent v. West Virginia, 129 U. S. 114;

Ex Parte McManus, 151 Cal. 331;

See also Mutual Film Corp. v. Ohio Indus'l. Comm., 236 U. S. 230.

That the legislation in question cannot be branded

as arbitrary or unreasonable is, we submit, clear. This is not a question of whether A or B or C or the Court may disagree with the Legislature on the question of advisability or policy or reasonableness; it is a question of whether the legislation is arbitrary or unreasonable in the established legal sense. It is very much like the question which is sometimes presented to a court upon the verdict of a jury. It makes no difference how much the court may differ with the jury as to what the verdict should have been upon the evidence. The question is merely whether there is any evidence upon which the jury might pass. The rules governing decisions of the courts in matters of this kind are thus summarized in Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, at page 78:

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest

upon any reasonable basis, but is essentially arbitrary."

In Rast v. Van Deman & Lewis Co., 240 U. S. 342, at page 357, the court said:

> "It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety . . . It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury but obstacles to a greater public welfare."

In Crescent Oil Co. v. Mississippi, 257 U. S. 129, the court said at page 137:

> "Every state of facts sufficient to sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed."

In Armour & Co. v. North Dakota, 240 U. S. 510, at page 513, the court said:

> "We said but a few days ago that if a belief of evils is not arbitrary we cannot measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation or certainly know them or be convinced of the wisdom or adequacy of the laws."

In Ward & Gow v. Krinsky, 259 U. S. 503, the court said at 520:

"The legislature, in the New York system, is justified in extending the benefits of the Compensation Law as far as it reasonably may determine occupational hazard to extend—to the vanishing point, as it were—and any lines of group definition it may adopt, if easily understood and applied, cannot reasonably be called 'an empty form of words' merely because they do not carry on their face the reasons for adopting them."

And at 521:

"No case that we recall illustrates more aptly or forcibly the wisdom of that familiar rule, expressed by this court in a recent case in these terms: 'There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds.'" And at 522:

"What was it they were aiming at, and how did they work to accomplish it? We need not be sure of hitting upon a correct, much less a complete, explanation. Upon the general presumption referred to, the questioned group must stand, unless it were demonstrated to a moral certainty, beyond a reasonable doubt, that the grouping could not possibly be explained on reasonable grounds."

See also Territory v. Takanabe, 28 Haw., 43, 45-6, citing Patsone v. Pennsylvania, 232 U. S. 138, 144.

We need not cite additional and more general cases in support of the general rule that every presumption should be made in support of the constitutionality of an Act of the legislature—a rule often applied

by this Court. The foregoing cases not only go to that point but also show the extent of the police power, the extent to which the legislature may go in classification, and the extent to which questions of this sort are for the legislature and not for the courts.

That private schools are a proper subject of regulation would seem to go without saying. In 24 Ruling Case Law 621 the validity of compulsory attendance at schools is recognized, and upon the ground that the control of the parent must yield to that of the state both for the benefit of the state and the benefit of the pupil, within, of course, proper limitations. In State v. Bailey, 157 Ind. 324, at page 329, the Court said:

> "The welfare of the child, and the best interests of society require that the State shall exert, its sovereign authority to secure to the child an opportunity to acquire an education. Statutes making it compulsory upon the parent, guardian, or other person having the custody and control of children to send them to public or private schools for longer or shorter periods, during certain years of the life of said children, have not only been upheld as strictly within the constitutional power of the legislature, but have generally been regarded as necessary to carry out the express purposes of the Constitution itself."

Compulsory education statutes do not require attendance at public schools alone, but at either public or private schools. Necessarily, in order to meet the requirements in respect of the period of years and

the field of knowledge to be covered, it must be within the power of the legislature to regulate within reasonable limits the qualifications of the teachers, the subjects to be covered, the instruction to be given and how and to what extent,—whatever the limitations may be as to the power to prohibit the giving of other instruction. The right to regulate private schools in Hawaii has long been unquestioned. For instance, Sec. 29 of the Act of July 10, 1865, provided that private schools might be established "provided they be not of an immoral tendency. The teachers of such schools shall annually report to the Board of Education the number of their scholars, by what means supported, and the general character and condition of their respective schools." We call special attention to the laws now in force in Hawaii relating to private schools in general, particularly those in R. L. 1925, Secs. 313-315 (Appendix xvii), which are made up of part of an Act of 1896 and subsequent amendments and which in some respects resemble those now in question relating to the Foreign Language Schools. And most of the provisions of the latter laws have already been held valid by one or more of the Territorial Circuit Court judges.

The recent decisions of the Federal Supreme Court in the Nebraska and Oregon cases are not the first expression of that Court on the subject of school legislation. For instance, in Barbier v. Connolly, 113 U. S. 27 at 31, the Court said:

> "But neither the (14th) amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the

power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

In Interstate Railway Co. v. Massachusetts, 207 U. S. 79, at 87, the Court said:

"Education is one of the purposes for which what is called the police power may be exercised. Barbier v. Connolly, 113 U. S. 27, 31. Massachusetts always has recognized it as one of the first objects of public care. It does not follow that it would be equally in accord with the conceptions at the base of our constitutional law to confer equal favors upon doctors or workingmen, or people who could afford to buy 1000-mile tickets. Structural habits count for as much as logic in drawing the line."

Thus showing that the legislature may go further in some respects as to the education of children than it can go even as to doctors and others—and that, too, in a matter only indirectly affecting education. That case went up from Massachusetts where the Act (requiring street railways to carry school children at half fare) was upheld by the Supreme Court of that State as well as by the Federal Supreme Court, but had to do only with children who attended the public schools. Later the law was amended so as to extend to the children of private schools, even including evening schools, and was upheld by the Supreme Court of Massachusetts,—in Commonwealth v. Boston & Northern St. Ry., 212 Mass. 83.

III.

THE LEGISLATION WAS NOT PROMPTED BY MOB-PSYCHOLOGY.

The Foreign Language School Acts of Hawaii were not prompted by any mob-psychology as opposing counsel has heretofore urged and, as was the case in the Nebraska, Iowa and Ohio school cases, nor are they the outcome of anything in the nature of Ku Klux Klanism, which produced the Oregon law. One of the indicia of mob-prejudice is its fugitive nature. The Hawaiian law was not the result of a passing prejudice, but of a firmly established policy developing naturally from an extremely difficult situation presented by the numerical dominance of alien races in Hawaii, and based, not merely upon a thorough study by a Commission acting under the authority of the Federal Commissioner of Education, but upon the results of conferences and cooperative action between the leading Americans of the community and the leading foreigners.

That the legislation represents a fundamental policy of the Territorial government appears from the fact that the laws are not the product of one legislature, but of three sessions at intervals of two years each, amending and developing the law as their understanding of the situation grew from a practical application of the acts and regulations.

Moreover, the legislature of the Territory of Hawaii expressed itself unequivocally as intending that the various provisions of the law should be considered as independent of each other when it provided in

Section 9A of Act 30, S. L. 1921, as amended by Section 6, Act 171, S. L. 1923:

> "If any section or part of this Act be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the Act as a whole, or any part thereof which can be given effect without the part so decided to be unconstitutional or invalid."

IV.

EVEN IF ONE OR MORE OF THE PROVISIONS OF THE FOREIGN LANGUAGE SCHOOL ACTS BE UNCONSTITUTIONAL, THE REMAINDER OF THE ACT, IF FOUND CONSTITUTIONAL, SHOULD BE DECLARED VALID.

One section of a statute may be repugnant to the Constitution without rendering the whole Act void and in a like manner one provision of a section may be invalid by reason of its not conforming to the Constitution, while all the other provisions may be subject to no constitutional infirmity. The only question to be considered in such case is whether such provisions, the constitutional and the unconstitutional, are so interdependent that one cannot operate without the other.

Berea College v. Kentucky 211 U. S. 45.
Pollock v. Farmers' Loan & Trust Co. 158 U. S. 601.
Reagan v. Farmers' Loan & Trust Co. 154 U. S. 362.

It is respectfully urged that in this case, if this court shall determine that the Circuit Court of Appeals was correct in holding one or more of the provisions of the Foreign Language School laws invalid

as repugnant to the Constitution, it should yet sustain such provisions of the law as do not fall within the constitutional prohibitions.

The provisions of the Acts are not essentially inter-dependent. That is shown by the growth of the law, one or two provisions being contained in the first enactment and others being added or the original ones modified from time to time as experience suggested new manners of dealing with the situation.

The Legislature particularly called upon the courts to preserve the statute even though some portions be declared unconstitutional when it provided (R. 66) that if any section or part of a law be held unconstitutional or invalid that such decision should not affect the validity of the law as a whole, but that any part thereof which could be given effect, should be administered.

The purpose of the Language School legislation, as amended, (R. 62) is to regulate the conducting of Foreign Language Schools and the teaching of foreign languages "that the Americanism of the pupils may be promoted." Therefore, if any one of the specific provisions of regulation be valid, it is submitted that the purpose of the statute is to that degree subserved, and should not fall even if another section or sections may be declared unconstitutional in the event that this court should not find the entire statute valid. In other words, if the provision relating to the inspection of the schools is good, that is in some degree a service toward the end intended by the statute. In a like manner, if the provisions requiring the use of the supervised text books or of a text

book in which it is recognized that the normal medium of expression of the pupils is English, are preserved, that is sufficient to uphold the statute. Again, if the regulations concerning the attendance of the students is upheld, it has some bearing, however slight, upon the promotion of the Americanism of the pupils. This is peculiarly true of the regulation of the teachers and the issuance of permits, for the assurance that the teachers have an understanding of English and of the knowledge of American institutions and of the background of American history and ideals is in a large degree a guaranty that the students would not be instructed in any manner that may be a pernicious influence upon their duties and responsibilities as American citizens. So that if any one of these particulars of the statute be upheld, the statute itself should stand even though other particulars should be held by this court to be invalid.

V.

SPECIFIC PROVISIONS OF THE ACTS.

Permits and Pledges. Section 391 forbids conducting, and Sec. 392 teaching in, a Foreign Language School without a permit from the Department of Public Instruction. Section 394 requires as a condition of obtaining such a permit, whether for conducting or teaching, that the applicant pledge himself to observe the terms of the law and regulations and to the best of his ability so direct the minds and studies of the pupils as will tend to make them good and loyal American citizens and not to instruct or permit instruction in any way inconsistent there-

with. Sec. 391 requires also, as a condition of obtaining a permit to conduct a school, the payment of the fee; and Sec. 393 requires, as a condition of obtaining a permit to teach, that the applicant shall satisfy the Department that he is possessed of the ideals of democracy, knowledge of American history and institutions and knows how to read, write and speak the English language.

We may add that in no event could the plaintiff schools complain on behalf of the teachers or as to the provisions relating to the teachers, for they are not the parties hurt by those provisions. In re Craig, 20 Haw. 483, 489-490; Territory v. Field, 23 Haw. 230, 232-3; Milton Dairy Co. v. Great Northern Ry. Co., 124 Minn. 239 (144 N. W. 764); Northern Pacific Railroad v. Whalen, 149 U. S. 157, 162; Mutual Film Corp. v. Kansas, 236 U. S. 248, 257-8; McCabe v. A. F. & S. F. Ry. Co., 235 U. S. 151, 162-3; Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 218-9. As well might a hospital maintain a suit to enjoin the enforcement of an act to license physicians—because they employ physicians. Furthermore, it is probable that those teachers who have availed themselves of the law and taken out permits, have waived the right to question the constitutionality of the legislation.

The issuance of a permit, which is in the nature of a license, is mandatory on the part of the Department provided the applicant has complied with the prescribed conditions (in re Kalama, 22 Haw. 96, 100; Tai Kee v. Minister of Interior, 11 Haw. 57) and if in such case a permit should be refused the appli-

cant could either compel its issuance by mandamus or else proceed with immunity to act as if he had a permit (Territory v. Kua, 22 Haw. 307, 317; Royall v. Virginia, 116 U. S. 572, 582-3); no permit can be revoked without giving the holder an opportunity to be heard (Wilson v. Lord-Young Engineering Co., 21 Haw. 87); and even if the provisions as to permits and pledges were invalid that would not affect the validity of the remaining portions of these Acts. Territory v. Apa, 28 Haw. 222, 227-8.

It is competent and usual everywhere to require a permit or license for the purpose of facilitating the regulation of an occupation or business; and this may be required for the mere purpose of facilitating the collection of a tax or fee. See Royall v. Virginia, 116 U. S. 572, 582; In re Kalama, 22 Haw. 96. Hence the only real question under this heading is not as to the permits but as to the prescribed conditions for obtaining permits.

The main objection urged against the pledge provision is that it requires the applicant upon obtaining a permit to observe all the terms of the law and regulations whether valid or invalid. No particular objection thus far has been made to the portion of the pledge which contemplates instruction consistently with loyalty to the United States; for opposing counsel have thus far contended that that is just what the schools and teachers are doing anyway—at least they have not yet taken the position that the schools and teachers should be allowed unrestricted license to teach loyalty to a foreign country and disloyalty to the home country of the pupils.

The argument that all the terms of the law and regulations would have to be observed whether valid or not is obviously unfounded. We contend that no term is invalid, but if any is invalid it would not be law. It is on this ground that it is held that in otherwise proper cases an injunction may issue to prevent persons who are State officers from enforcing an alleged invalid statute, because, if the statute is invalid, such persons are held to act not in their official but in a private capacity. Cavanaugh v. Looney, 248 U. S. 453, 456, and cases there cited. The provision in question is not unlike the common provision in license laws which requires the licensee to give a bond to observe all the terms and conditions of the law, in which case it would seem that he would not be liable on the bond by reason of failure to observe an invalid provision (New London v. Howe, 94 Conn. 269, 274; 108 Atl. 529), or it is somewhat analogous to a provision which makes the issuance of a license conditional upon the licensee observing the provisions of the law, in which case also it would seem that the licensee would not be precluded from setting up the invalidity of any of the provisions. See The King v. Lau Kui, 7 Haw. 489. The word "terms" in this section cannot mean more than the word "provisions" would mean. In Section 9 of Act 30 as originally enacted (Appendix, p. v), this being the section which makes a violation of the Act or regulations a misdemeanor and prescribes the penalty, the word "terms" as well as "provisions" is used, but it would be absurd to say that a person could be convicted and punished for a violation of an invalid term or provision. All, both persons conducting

schools and teachers during the first two years, and all of both classes who have since taken out permits, have taken the pledge without objection.

The principal argument made by opposing counsel heretofore and adopted by the Circuit Court of Appeals against the validity of the provision requiring certain qualifications for teachers has been that, while it might be reasonable to require teachers in the Japanese Language Schools to possess qualifications as teachers of the Japanese language, it is unreasonable, arbitrary and oppressive to require them to have qualifications in other subjects. This argument is based on an erroneous assumption of fact that only the Japanese language is taught in these schools and upon a false notion as to the breadth of the police power. It ignores the major ultimate objects of education from the standpoint of the state as well as the actual situation existing in Hawaii. Can it be that it is beyond the legislative power to require that teachers of American pupils in schools in America shall as one of their qualifications know something of the ideals, history, institutions and language of the country? The recent pronouncements of the Federal Supreme Court in the Nebraska and Oregon cases would seem to be sufficient answer. The "Survey" above referred to shows that instruction in these schools is not confined to the Japanese language, but extends to many other subjects, including even American history, institutions and ideals. And yet it is contended that the legislature cannot require these teachers to possess qualifications in these subjects even to an elementary extent!

It is immaterial that some of the teachers teach other subjects — particularly reading and writing. Anyone who knows anything about pedagogical methods knows that the teaching of even reading and writing does not consist merely of the teaching of words as from a dictionary, especially at the present stage of pedagogical science. These subjects are taught largely through stories, historical and fanciful, and through literature on other subjects. Matters of general knowledge, morality, patriotism, etc., are naturally and necessarily prominent. The teachers are in daily contact and touch with the pupils, who are American citizens, and these teachers, especially considering their own views, cannot confine their instruction and influence to mere matters of language. Naturally questions arise and discussions are had in regard to American subjects and comparison is made with corresponding Japanese subjects on the part of the pupils, who at the same time attend the public schools of the Territory. As shown in the "Survey," not only are questions of loyalty and other questions particularly bearing on citizenship covered in the Japanese text books, but the tendency of many of the teachers to turn the minds of the pupils towards loyalty to Japan and its emperor as their country and their emperor, is shown by the testimony of those most competent to give testimony on the subject—on pages 130-3 of the "Survey." Even if it could be shown that some of the teachers did not go into subjects other than mere reading and writing, it would not affect the validity of the Act, and of course the teachers doubtless are shifted about from time to time, sometimes teaching one subject and

sometimes another. And even if it could be shown that the text books were confined merely to teaching the language, that would not prevent the requirement of these qualifications of persons who are such daily guides, philosophers and friends of the pupils in a vast system of schools like this and under the special conditions existing in this Territory. As well say that a man who desires to devote himself exclusively to the practice of criminal law might successfully contend that an act which would require him to pass an examination in law in general in order to be admitted to the bar, is unconstitutional by reason of going too far or being too broad.

However, it is unnecessary in order to support these provisions to go into the actual subjects taught or the methods of teaching them. It is sufficient that teachers of American citizens in this extensive system of schools should know at least the elements of the history, institutions, ideals and language of the country in which they are teaching and of which their pupils are citizens. Even as to the English language they should at least be in a position to read further on such subjects as American history, institutions and ideals and particularly the daily newspapers in order that they may be in a position to understand local conditions and discuss intelligently and along right lines such subjects as would naturally arise between them and their pupils affecting the quality of the latter's American citizenship—whether they actually endeavor to teach good American citizenship or refrain from teaching disloyalty to America or not, and they should be in a position to

correlate the Japanese words with the English words which the children are studying at the same time in the public schools. This provision on qualifications might well constitutionally go much further but how far it might properly go is a question that need not concern the Court in this case. It is well within proper limits. It is within the field of legislative power—whether the courts agree as to the policy or not. It is intended to meet, in a remarkably mild way, a great urgent public need.

The opinion of the Circuit Court of Appeals in Farrington v. Tokushige, 11 F. (2d) 710, advances, as an argument against the validity of this provision, the fact that although a substantial understanding of American history, institutions and ideals is required of the teachers, the Territory does not require a knowledge of the foreign language in which the school is being conducted. We urge that the absence of this requirement is one of the many indicia of the propriety of the statutory regulations of these schools. The control of the schools is left in the hands of the associations in all respects in which they do not threaten the safety and political health of the community if not regulated.

To a lesser degree opposing counsel have objected that this provision offends against the rule of reasonable classification and also that no standard of qualification is defined and hence that more or less arbitrary power is vested in the officials who are to pass upon the qualifications of applicants. The legislature was not acting theoretically but with reference to particular needs. And as to standards of meas-

urement, the proof of the pudding is in the eating; no difficulty has been found thus far by those applying the tests nor complaints made by those to whom the tests have been applied. As well say that tests of these kinds could not be made for graduation purposes by schools and colleges. See Mutual Film Corp. v. Ohio Industrial Comm., 236 U. S. 230, 245-6; Hall v. Geiger-Jones Co., 242 U. S. 539, 552-4; Merrick v. Halsey & Co., Id., 568, 590; Bratton v. Chandler, 260 U. S. 110, 114; Gundling v. Chicago, 177 U. S. 183, 187; Ex parte McManus, 151 Cal. 331, 335; Riley v. Chandler, 181 Cal. 589, 595 (185 Pac. 855, 858).

Reports. The last paragraph of Sec. 391 (R. 61) requires one who conducts a Foreign Language School to file with the Department not later than June 15 of each year a sworn list of the pupils showing the name, sex, parents or guardians, place of birth and residence of each child.

It is difficult to see what possible constitutional objection there can be to this provision calling for information in regard to the pupils—whether it is desired for the purpose of determining the amount of the fee or for throwing light on the problems of regulation or for general statistical purposes. Information of this nature has long been required of private schools in general in Hawaii, as, for instance, under the Act of 1865 and in the present law (see Sec. 313, Appendix hereof, p. xviii) and no one has ever objected to furnishing it or questioned the power of the legislature to require it.

It is common in license laws and ordinances to require information to be furnished by licensees ac-

cording to the nature of the business and the purposes for which the information is desired (see New London v. Howe, 94 Conn. 269, 275; 108 Atl. 529), and this has been a common requirement under Hawaiian license laws.

Although the plaintiffs in their bill claim that the Acts and regulations in question are contrary to the liberty and property clauses of the 5th and 14th Amendments and the equal protection clause of the latter Amendment, they have nowhere and at no time hitherto invoked the aid of the security provisions of the 4th Amendment or the protection of the 5th Amendment against compulsion to be a witness against oneself. Provisions which go much further than that now in question have been sustained in various classes of statutes. We need not dwell upon the extent to which laws everywhere go in calling for detailed information from or requiring thorough investigations of the affairs of banks and trust, insurance and other companies, which certainly are of no greater public concern than a vast system of schools for the education of citizens of the country. We all are familiar with the extensiveness of the information required under the tax laws and particularly those of the Federal government. In Flint v. Stone Tracy Co., 220 U. S. 107, 174-7, the Court not only sustained the validity of provisions of this kind in the corporation tax law, but held that the information obtained might in the legislative discretion be made public. Similarly as to provisions of this nature in the income tax law. United States v. Baltimore Post, 16 U. S. S. C. Adv. Ops. 1924-5, 633.

Likewise we are familiar with the extent of the information required under the census laws. See 2 Fed. St. An., 2nd ed., pp. 50-1; United States v. Sarle, 45 Fed. 191.

On this point opposing counsel has heretofore cited Salisbury v. Equitable Purchasing Co., 147 S. W. (Ky. Ct. of App.) 813, but in that case the statute was very different from the provision now in question in its onerousness and inquisitorial nature, especially when considered in connection with the kind of business involved and its effects upon others than those engaged in it—so much so that the court apparently thought the act had its origin in malice or ill will, or, if not, at least in an unreasonable, arbitrary, capricious and oppressive disposition.

Text Books and Attendance. Sec. 396 (R. 63) confers on the Department of Public Instruction power to make regulations relating to various enumerated subjects and prescribes that until otherwise provided by the Department, up to September 1, 1923, pupils shall have completed the public school first grade or its equivalent, and thereafter the first and second grades, before attending a Foreign Language School; also that beginning Sept. 1, 1923, and thereafter for grades one, two and three, and beginning Sept 1, 1924, and thereafter for grades four and above, all new text books used in elementary Foreign Language Schools shall be based upon the principle that the pupil's normal medium of expression is English and shall contain in as far as practicable English equivalents for foreign words and idioms. The Department was also authorized to prepare or cause to be pre-

pared suitable text books for the teaching of foreign languages in the Foreign Language Schools and to arrange for the publication and sale thereof; it was provided further that in the Foreign Language Schools no subject should be taught nor course followed nor entrance nor attendance qualification required nor next books used other than as prescribed or permitted by the Department, and finally that the regulations prescribed in this section as to text books and attendance might be changed by the Department. This was a section of Act 30 of 1920 as amended by Act 171 in 1923. On Sept. 1, 1925, the Department modified these limitations as to attendance by providing (R. 66) that they should not apply to Foreign Language Schools whose text books and course of study were approved by the Department as to any pupils who were also in regular attendance at a public school or equivalent private school.

It will be remembered (see pp. 15-16 above) that in 1922, upon the recommendation of a joint committee of American and Japanese experts who were appointed to revise the text books, the Department adopted regulations as to attendance and text books substantially as shortly afterward embodied in the Act; that in consequence of a ruling by the Hawaiian court that the regulations were not at that time within the authority of the Department the Legislature afterwards embodied the regulations as to both attendance and text books in the Act; that new text books were prepared; that the revision of the text books was for the purpose of further Americanizing them, correlating them with the study of

English in the public and equivalent private schools, and improving them in accordance with recognized correct pedagogical principles; that the regulations as to attendance were for doing away with the serious hindrance to the study of English in its initial stages among the younger pupils (first and second grades) in the public and equivalent private schools as well as for the mental and physical welfare of these very young children; that the results obtained from the use of the new text books by the numerous Foreign Language Schools which have adopted them have been highly satisfactory, and that after further study of the whole situation the Department concluded that it could without undue detriment do away with the attendance requirement as to the Foreign Language Schools which used the new text books. This it did by the regulations now in question.

If the regulations are ineffective the statute remains. The main effect of the regulations is to mitigate (Do plaintiffs complain of this?) the statute by practically doing away with the attendance requirement by providing that it shall not apply in the cases of schools which use text books approved by the Department as to pupils in attendance at the public schools or equivalent private schools, which include all of the theretofore excluded pupils in the 1st and 2nd grades, leaving the statute to apply if at all as to attendance only to some of the very young children in some of the kindergartens which are maintained by some of the schools. How many, if any, pupils would thus be excluded is a question and it is prob-

ably much more of a question whether any question arising from that fact would ever become the subject of litigation; and in general, as already shown, statutes and regulations are not rendered invalid merely because by reason of their generality they exclude or include a little more or less than might be thought to be most appropriate or desirable.

The rub seems to have come with the attendance provision. Apparently, whatever may be pretended to the contrary, there is no real objection to the new text books at the present time except as a matter of false pride. All know that the new books are much superior to the old ones—so much so that it is believed that as much can be accomplished in six years with the new as in eight years with the old, not to mention the added interest and inspiration that they have instilled into the teachers and pupils alike who have used them. If there is any other real objection to the new books it must be a desire on the part of the plaintiff schools or those back of them to continue the use of text books prepared in large part from the Japanese standpoint—so that the question would come down to this: Is it competent for the Legislature to forbid foreign teachers of citizen pupils throughout the Territory to use text books which tend to teach loyalty to foreign countries and disloyalty to the home country, and is it competent for the Legislature to require that text books used in such schools shall contain as far as practicable English equivalents for the foreign words and idioms (which the new text books do in a glossary at the end) so as to correlate the work of the Foreign

Language Schools with that of the public and equivalent private schools in the important matter of the language of the country under the existing conditions which make it so difficult to teach this language to these young citizens who dwell in homes with foreign parents; and is it competent for the Legislature directly or through the Department to forbid the youngest children (1st and 2nd grades) in the public and equivalent private schools to attend the Foreign Language Schools unless the latter use text books that will at least mitigate the evils which would otherwise result from the attendance of the children at both schools during their tender years and during this crucial initial period in the work of the regular schools? The answer would seem to be found in the pronouncements of this court set forth in Pierce v. Society of Sisters of Holy Names, 268 U. S. 510.

Opposing counsel has insinuated with an absolute abence of basis either in the record or in fact, that the whole text book matter was gotten up as a money-making scheme for the benefit of the Territory or of some friendly publishing company. The statutory provisions (Tr. pp. 60, 64), bearing on this matter do not seem to contemplate that the Department itself should publish and sell the books but to provide that all royalties, commissions and money, if any, received by it in connection with their publication or sale shall be used for the purposes of the Act and be taken into consideration for the purpose of reducing the fees; and, as to helping out any friendly publisher, not only is that absurd on the face of it but it is contrary to the spirit shown by the Department throughout in its administration of the Act.

CONCLUSION

It is submitted that the Foreign Language School law is fully within the police powers of the Territory, being a regulatory and not a prohibitory law and therefore within the restrictive language of this court in the recent school cases from Nebraska, Iowa and Oregon; and that even if one or more of the specific provisions of the statute should be held unconstitutional, still there remains enough in the law to forward its end in protecting the Americanism of young citizens of foreign blood and that the Act therefore should be held valid even in the event that this Court should strike certain portions therefrom as unconstitutional.

Respectfully submitted,

WILLIAM B. LYMER,
Attorney General of the Territory of Hawaii.

MARGUERITE K. ASHFORD,
First Deputy Attorney General of the Territory of Hawaii.
Attorneys for Petitioners.

(Appendix follows)

Appendix.

ACT 30

Special Session of 1920,

Territory of Hawaii.

AN ACT Relating to Foreign Language Schools and Teachers Thereof.

Be It Enacted by the Legislature of the Territory of Hawaii.

Section 1. The term "foreign language school" as used in this Act, shall be construed to mean any school which is conducted in any language other than the English language or Hawaiian language, except Sabbath schools. The word "department" shall mean the department of public instruction of the Territory of Hawaii.

Section 2. No person shall conduct a foreign language school in the Territory of Hawaii, unless and until he shall have first applied to and obtained a permit so to do from the department of public instruction of the territory.

Section 3. No person shall teach in a foreign language school unless and until he shall have first applied to and obtained a permit so to do from the department, and this shall also be construed to include persons exercising or performing administrative powers at any school.

Section 4. No permit to teach in a foreign language school shall be granted unless and until the department is satisfied that the applicant for the same is possessed of the ideals of democracy; knowledge of American history and institutions and knows how to read, write and speak the English language.

Provided, however, that the provision concerning knowledge of the English language shall be liberally construed during the two years after this Act goes into effect; it being understood that it would be difficult within that time to secure teachers fully qualified under this section and at the same time qualified to teach a foreign language. And provided, further, and it is hereby declared that the object of this Act is to regulate and not to prohibit the conducting of foreign language schools and the teaching of foreign languages; but to regulate the same so that the Americanism of the pupils may be promoted, and the department is hereby directed to carry this Act into effect in accordance with the spirit of this declaration.

Section 5. Before issuing a permit to conduct a foreign language school or to teach in such a school the department shall require the applicant for such permit to sign a pledge that the applicant will, if granted a permit to conduct or teach in such a school, abide by and observe the terms of this law and the regulations and orders of the department and will, to the best of his ability, so direct the minds and studies of pupils in said school as will tend to make them good and loyal American citizens and will not instruct or permit said pupils to receive instruction in said school in any way inconsistent therewith.

Section 6. No foreign language school shall be conducted in the morning before the school hours of the public schools or during the hours while the public schools are in session. Nor shall any pupil attend a foreign language school for more than one hour

each day nor exceeding six hours in any one week, nor exceeding thirty-eight weeks in any school year.

Provided, however, that the department may, in its discretion, with the approval of the governor, modify the terms of this section if it deems it can do so consistetly with the declared object of this Act.

Section 7. The department shall have full power from time to time to prescribe the course and courses of study and the text books to be used in any foreign language school, and no other course of instruction or text books shall be used in such schools, except the ones prescribed by the said department. No books used in any foreign language school shall be furnished at the expense of the department.

Section 8. If the department shall at any time become satisfied that any holder of a permit to conduct a foreign language school or to teach therein does not possess the qualifications herein required, or shall have violated or failed to observe any of the provisions of this Act, or of the regulations or orders of the department, the department may then and thereupon revoke the permit theretofore granted and the same shall thereupon be and become null and void.

Provided, however, that before so doing, the department shall first notify the holder of said permit to show cause why such action should not be taken and shall give such holder full opportunity to be heard in defense. The decision of the department shall be final.

Section 9. Any person who shall conduct a for-

eign language school, or who shall teach in a foreign language school, contrary to the provisions of this Act, or who shall violate any of the terms thereof, or of the regulations or orders of the department, shall be guilty of a misdemeanor and upon conviction thereof punished by a fine not to exceed twenty-five dollars ($25.00). Each day's violation of this Act shall be deemed a separate offense.

Section 10. This Act shall take effect on the first day of July, 1921.

Approved this 24th day of November, A. D. 1920.

C. J. McCARTHY,
Governor of the Territory of Hawaii

ACT 171

Session Laws of 1923,

Territory of Hawaii.

AN ACT to Amend Sections 1, 2, 4, 7 and 8 of Act 30 of the Special Session Laws of 1920, and Adding Thereto a New Section to be Known as Section 9A, Relating to Foreign Language Schools.

Be It Enacted by the Legislature of the Territory of Hawaii:

Section 1. Section 1 of Act 30 of the Special Session Laws of 1920, is hereby amended to read as follows:

"Section 1. The term 'foreign language school,' as used in this Act shall be construed to mean any school which is conducted in any language other than

the English language or Hawaiian language, except Sabbath schools. All subdivisions and activities under the direction, management or supervision of any foreign language school, whatever language may be used in such subdivision and/or activities, shall be subject to the provisions of this Act. The word 'department' shall mean the department of public instruction of the Territory of Hawaii."

Section 2. Section 2 of Act 30 of the Special Session Laws of 1920 is hereby amended to read as follows:

"Section 2. No person shall conduct a foreign language school in the Territory of Hawaii without a written permit from the department of public instruction. All permits, licenses, certificates or consents of every kind or nature issued by the department to any foreign language school, or to any person or persons conducting such school—irrespective of the law or laws under which the same were issued and the time when issued—shall on or after May 5, 1923, be of no effect. After September 1, 1923, no permit shall be issued without a fee being paid therefor, the amount of which fee shall be based on the school attendance. The said fee shall be computed on the average attendance of the previous year at the rate of one dollar ($1.00) per pupil, except as to schools just starting, the fee of which shall be computed at the same rate on the expected average attendance — as estimated by the department — and shall be correctly adjusted to conform to the actual average attendance, by an addition to, or a subtraction from, the fee payable for the following year.

"On September 1, 1923, and annually thereafter, all permits, in order to be valid, must be renewed and shall, unless previously forfeited, be renewed by the department on the payment of a fee determined in the same manner as above specified; provided, that the department shall not be required to renew a permit for the conducting of any foreign language school in the conducting of which there has been a violation of the terms or provisions of this Act. All of said fees collected by the said department shall be paid over to the treasurer of the Territory of Hawaii, and the moneys so paid are hereby appropriated to the department of public instruction to be expended in enforcing and carrying out the provisions of this Act. If at any time the funds at the disposal of the department from fees previously collected, or from royalties, commissions or other moneys received in connection with the publication or sale of foreign language school text books, shall make it possible fully and effectively to carry out the provisions of this Act with the permit fees payable by the schools based on a lower rate than one dollar ($1.00) per pupil, the department is authorized to make such a reduction in that rate as it may deem reasonable and expedient.

"Every person conducting a foreign language school shall, not later than June 15 of each year, file with the department on forms prescribed or furnished by it, a sworn list of all pupils in attendance at said school during the current school year, showing the name, sex, parents, or guardians, place of birth and residence of each child; provided, however, that

the department may, on cause shown, modify the requirements of this sentence during the year 1923."

Section 3. Section 4 of Act 30 of the Special Session Laws of 1920 is hereby amended to read as follows:

"Section 4. No permit to teach in a foreign language school shall be granted unless and until the department is satisfied that the applicant for the same is possessed of the ideals of democracy; knowledge of American history and institutions, and knows how to read, write and speak the English language.

"It is hereby declared that the object of this Act is to fully and effectively regulate the conducting of foreign language schools and the teaching of foreign languages, that the Americanism of the pupils may be promoted; and the department is hereby directed to carry this Act into effect in accordance with this declaration."

Section 4. Section 7 of Act 30 of the Special Session Laws of 1920 is hereby amended to read as follows:

"Section 7. The department shall have full power from time to time to prescribe, by regulations, the subjects and courses of study of all foreign language schools, and the entrance and attendance prerequisites or qualifications of education, age, school attainment, demonstrated mental capacity, health and otherwise, and the text books to be used in any foreign language school.

"Until otherwise provided by the department, the following regulations shall be in effect:

"From the present up to September 1, 1923, every pupil shall have first satisfactorily completed the American public school first grade, or a course equivalent thereto, before attending, or being allowed to further attend, any foreign language school.

"Beginning September 1, 1923, and thereafter, every pupil shall have first satisfactorily completed the American public school first and second grades, or courses equivalent thereto, before attending or being allowed to further attend, any foreign language school.

"Beginning September 1, 1923, and thereafter, for grades one, two and three; and beginning September 1, 1924, and thereafter, for grades four and above; all new text books used in elementary foreign language schools shall be based upon the principle that the pupil's normal medium of expression is English and shall contain, as far as practicable, English equivalents for foreign words and idioms.

"The department is hereby authorized to prepare or cause to be prepared or procure or arrange for procuring suitable text books for the teaching of foreign languages in the foreign language schools and to enter into an agreement or agreements for the publishing and sale of the same. All royalties, commissions and money received by or on behalf of the department in connection with the publication or sale of such text books shall be paid over to the treasurer of the territory and are hereby appropriated to the department to be expended for the purposes of this Act. In every foreign language school no subject of study shall be taught, nor course of study fol-

lowed, nor entrance nor attendance qualification required, nor text books used, other than as prescribed or permitted by the department, provided, however, that the regulations set forth in Section 7 of this Act shall be effective until superseded in part, or in whole, by others made by the department."

Section 5. Section 8 of Act 30 of the Special Session Laws of 1920, is hereby amended to read as follows:

"Section 8. The department shall have power to appoint one or more inspectors of foreign language schools and to pay the salaries and necessary expenses thereof; such inspectors and other duly authorized agents of the department shall have the right freely to visit said foreign language schools and to inspect the buildings, equipment, records, and teaching thereof and the text books used therein.

"If the department shall at any time become satisfied that any holder of a permit to conduct a foreign language school or to teach therein does not possess the qualifications herein required, or shall have violated or failed to observe any of the provisions of this Act, or of the regulations or orders of the department, the department may then and thereupon revoke the permit theretofore granted and the same shall thereupon be and become null and void."

Section 6. Act 30 of the Special Session Laws of 1920 is hereby amended by adding thereto a new section to be known as Section 9A and to read as follows:

"Section 9A. If any section or part of this Act be decided by the courts to be unconstitutional or in-

valid, the same shall not affect the validity of the Act as a whole, or any part thereof which can be given effect without the part so decided to be unconstitutional or invalid."

Section 7. This Act shall take effect upon its approval.

Approved this 2nd day of May, A. D. 1923.

W. R. FARRINGTON,
Governor of the Territory of Hawaii.

ACT 152

Session Laws of 1925,

Territory of Hawaii.

AN ACT to Amend Sections 391 and 398 of the Revised Laws of Hawaii 1925, Relating to Foreign Language Schools.

Be It Enacted by the Legislature of the Territory of Hawaii:

Section 1. Section 391 of the Revised Laws of Hawaii 1925, is hereby amended by substituting for the first paragraph thereof the following:

"Section 391. *Permits, fees.* No foreign language school shall be conducted in the Territory unless under a written permit therefor from the department of public instruction nor unless the fee therefor shall have been paid as hereinafter provided. Nor shall such permit be issued unless such fee shall have been paid. Such permit shall be kept exposed in a prominent place at such school so as to be readily seen and read by visitors thereat.

"For the purposes of this chapter the school year shall be deemed to begin on September 1 of each year and to end on August 31 of the following year. After May 10, 1925, on or before the first day on which any foreign language school shall be conducted in any school year or unexpired part thereof, there shall be paid to the department for or in respect of conducting such school during such school year or unexpired part thereof a fee, the amount of which shall be computed as nearly as may be, at the rate of one dollar ($1.00) per pupil, on the estimated average attendance of pupils at such school during the period during which such school was conducted in the next preceding school year, or, if such school shall not have been conducted during any part of such preceding school year, then at the same rate on the estimated expected average attendance during the school year or unexpired part thereof in question, in which latter case the amount shall be adjusted to conform to the estimated average attendance during such year or part thereof by an addition to or subtraction from the fee payable for the next following school year. The amount of such fee shall be estimated and determined by the department from such information as it may have and shall be payable by any person, persons or corporation conducting or participating in conducting such school. All officers, all teachers, and all members of any committee or governing board of any such school, and, in case such school is conducted by or for a corporation or a voluntary association or other group of persons, all members or associates of such corporation, association or group, shall be deemed to be participants in conducting such school.

Payment heretofore made for any school for the school year beginning September 1, 1924, or any part thereof of the fee which was provided for in this section before the passage of this amendment shall be deemed to be in full satisfaction of the fee required hereunder for such school for such school year or the unexpired part thereof.

"In case any such school shall be conducted at any time without such fee having been paid for conducting the same, the Territory may recover such fee in a civil action against any person, persons or corporation who or which so conducted or participated in so conducting such school, and for that purpose if such school is conducted, or if its conducting is participated in, by a corporation or a voluntary association, or other group of persons, such action may be brought against such corporation or association or group in its corporation or association or common name, with or without joining any or all individual defendants who may be liable for such fee, and, in a case of such association or group, process may be served on any officer or teacher, or on any member of a committee or governing board, or on any member or associate, of such school, association or group, and any judgment recovered against the corporation or association or group as such may be enforced against the property of the corporation or the joint property of the members or associates of such association or group, as the case may be, and against the individual property of any of the officers, teachers, members of any committee or governing board, or members or associates of such school, corporation, association or

group, who shall have been served with process or who shall have appeared in the action, in the same manner and to the same extent as if all had been named as defendants. The civil and penal remedies under this chapter shall be concurrent and not exclusive of each other. No injunction shall issue from, nor shall any suit be maintained in, any court for the purpose of restraining the determination or collection of any such fee or the prosecution of any penal proceeding for conducting or participating in conducting any such school without such fee having been paid; but any payor of any such fee who desires to contest the validity thereof may do so under the provisions of Section 1444, for which purpose the department shall be deemed a public accountant within the meaning of that section and Section 1436."

Section 2. Section 398 of said Revised Laws is hereby amended so as to read as follows:

"Section 398. *Penalties.* Any person who shall conduct or participate in conducting a foreign language school, or who shall teach in a foreign language school, contrary to the provisions of this chapter, or who shall violate or participate in violating any of the provisions thereof or of the regulations or orders of the department, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed twenty-five dollars ($25.00). Each day's violation of this chapter or of any of the provisions thereof shall be deemed a separate offense."

Section 3. This Act shall take effect upon its approval.

Approved this 29th day of April, A. D. 1925.

W. R. FARRINGTON,
Governor of the Territory of Hawaii.

ACT 36

Special Session of 1920,

Territory of Hawii.

AN ACT to Prescribe Certain Qualifications for School Teachers for the Purpose of Safeguarding American Citizenship in the Territory of Hawaii.

Be It Enacted by the Legislature of the Territory of Hawaii:

Section 1. No person shall serve as a teacher in any school without first having obtained a certificate from the department of public instruction, which certificate shall be issued, without cost to the teacher, in such form as the department shall determine. Before issuing a certificate to any teacher, the department shall satisfy itself that such teacher is possessed of the ideals of democracy, knowledge of American history and institutions, and knows how to read, write and speak the English language; provided, however that the provision concerning knowledge of the English language, shall be liberally construed during the two years after this Act goes into effect.

Section 2. For the purpose of this Act the word "teacher" shall be construed to include also persons exercising or performing administrative powers or

duties at any school. The word "school" shall be construed to include every school, whether under governmental supervision or otherwise, except Sabbath schools which convene once each week.

Section 3. The department may revoke any such certificate after issuance thereof when satisfied that the holder thereof does not possess the ideals or knowledge mentioned in Section 1 of this Act, but in such case the holder of the certificate shall first be given full opportunity to justify the holding of the certificate.

Section 4. Whoever shall serve as a teacher, without holding an unrevoked certificate issued hereunder, shall be punished by a fine not exceeding twenty-five dollars ($25.00).

Section 5. This Act shall take effect July 1, 1921.

Approved this 24th day of November, A. D. 1920.

C. J. McCARTHY,
Governor of the Territory of Hawaii.

GENERAL LAWS RELATING TO PRIVATE SCHOOLS.

Secs. 309, 313-315, Revised Laws of Hawaii, 1925.

Sec. 309. *Public, Private.* All schools established and maintained by the department in accordance with law are public schools. All other schools established and conducted in compliance with law are private schools, irrespective of the hours during which the sessions shall take place. (L. 1896, c. 57, s. 31; C. L. s. 112; R. L. s. 206; am. L. 1907, c. 46, s. 1; R. L. 1915, s. 272; am. L. 1920, c. 23 s. 1.)

Sec. 313. *Private, How Established.* Any person or persons desiring to establish a private school within the Territory of Hawaii shall, prior to the establishment thereof, make an application in writing to the department of public instruction of the Territory, which application shall be signed by the applicant or applicants and shall state in substance (1) the name or names of the persons desiring to establish such school; (2) the proposed location thereof; and (3) the course of instruction and the languages in which such instruction is to be given.

Upon the receipt and approval of such application, the department of public instruction shall issue to the person or persons applying therefor a permit in form to be by it approved, authorizing the establishment of such school; and no private school shall be established within the Territory except in conformity with this chapter.

Attendance at any school established or maintained without complying with the terms of this section shall not be considered attendance at a public or private school within the meaning of this chapter.

The department may, from time to time, require regularly established private schools to submit reports in such form as it may deem proper. Failure to comply with the provision of this section shall constitute an offense punishable, upon conviction, by a fine not exceeding ten dollars for each offense. (L. 1896, c. 57, s. 21; C. L. s. 114; R. L. s. 209; am. L. 1907, c. 48, s. 1; R. L. 1915, s. 275; am. L. 1917, c. 75, s. 1; am. L. 1920, c. 21, s. 1.)

Sec. 314. *Supervised by Department.* Every private school shall be subject to the supervision of the department. It shall be the duty of the department to require that teachers of private schools be persons of good moral character; and that the premises of such schools comply with the rules and regulations of the department, as from time to time promulgated with regard to sanitary conditions and hygiene. (L. k. 896, c. 57, s. 22; C. L. s. 115; R. L. s. 210; R. L. 1915, s. 276.)

Sec. 315. *English Language Basis of Instruction.* The English language shall be the medium and basis of instruction in all public and private schools within the Territory and any school where English is not the medium and basis of instruction shall not be recognized as a public or private school within the provisions of this chapter and attendance thereat shall not be considered attendance at school in compliance with law. Provided, however, that the Hawaiian language shall be taught in addition to the English in all normal and high schools of the Territory; and that where it is desired that another language shall be taught in addition to the English language, such instruction may be authorized by the department, by direct order in any particular instance. Provided, further, that instruction in such courses shall be elective. (L. 1896, c. 57, s. 30; C. L. s. 123; R. L. s. 211; am. L. 1907, c. 47, s. 1; R. L. 1915, s. 277; am. L. 1919, c. 191, s. 1.)

GENERAL LAW, PAYMENT UNDER PROTEST

Sections 1436 and 1444.

Revised Laws of Hawaii, 1925

Sec. 1436. *Public Accountants Defined, Duties.* All persons who, by any law, regulation or appointment are charged with the duty of collecting or receiving revenue or other moneys on account of the Territory, or with the duty of disbursing moneys on account of the public service shall become and be "public accountants," and shall perform all such duties and render such accounts as this chapter prescribes, and as the treasurer and auditor shall from time to time direct. (L. 1898, c. 39, s. 29; R. L. s. 1515; R. L. 1915, s. 1384.)

Sec. 1444. *Payment to Territory Under Protest.* Moneys representing a claim in favor of the Territory may be paid to a public accountant of the Territory under protest in writing signed by the person making such payment, or by his agent, setting forth the grounds of such protest, in which event the public accountant to whom such payment is made shall hold the money so paid for a period of thirty days from the date of payment.

Action to recover the money so paid, or proceedings to adjust the claim may be commenced by the payor or claimant against the public accountant to whom the payment was made, in a court of competent jurisdiction, within said period of thirty days, and in default of bringing such suit or proceedings within said period, the money so paid shall be by

such accountant deposited in the Treasury of the Territory, and the same shall thereupon become a government realization.

If action to recover the money so paid under protest, or proceedings to adjust the claim, shall be commenced within thirty days after payment of the money under protest, the amount so paid shall be transmitted by the public accountant to the treasurer of the Territory who shall hold the same as a special deposit pending the final decision of the cause. If the final decision of the cause shall be in favor of the claimant, the treasurer of the Territory shall pay to him out of such special deposit, such amount as shall have been adjudged to be due to him in such cause; the amount so to be paid to be ascertained by the treasurer from a certified copy of the judgment of the court in which the cause was finally determined which shall be his authority and warrant for such payment. (L. 1907, c. 45, s. 1; R. L. 1915, s. 1392.)